

LABOR CABINET
Department of Workplace Standards
(New Administrative Regulation)

803 KAR 1:026. Equal pay provisions, meaning and application.

RELATES TO: KRS 337.420-337.433

STATUTORY AUTHORITY: KRS 337.420(3), 337.425(4)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.425 authorizes the Commissioner of Workplace Standards to issue administrative regulations appropriate to carry out the provisions of KRS 337.420 to 337.433. The function of this administrative regulation is to provide guidance with respect to the meaning and application of the equal pay provisions set forth in KRS 337.420 to 337.433.

Section 1. Definitions. (1) "Employer" is defined by KRS 337.420(2).

(2) "Establishment" means a distinct physical place of business. Each physically separate place of business is considered a separate establishment.

(3) "Wage rate" is defined by KRS 337.420(3) and includes all payments made to or on behalf of the employee as remuneration for employment. This includes fringe benefits such as vacation and holiday pay, premium payments for work on Saturdays, Sundays, holidays, regular days of rest, pension benefits, insurance benefits, and other fringe benefits paid as compensation for employment. Payments made by an employer to an employee which do not constitute compensation for employment, such as payments related to maternity and reasonable payments for reimbursable expenses of traveling on the employer's business, are not wages to be compared for equal pay purposes.

Section 2. Application of Provisions in General.

(1) Application to employers. The prohibition against discrimination in wages on the basis of sex contained in KRS 337.423 applies to every employer within the state.

(2) Application to establishments.

(a) The prohibition against discrimination in wages on the basis of sex applies within the same establishment.

(b) Where an employer has more than one (1) establishment in which he or she employs employees, there shall be no comparison between wages paid to employees in different establishments.

Section 3. Male Jobs and Female Jobs. (1) Where an employee of one (1) sex is hired or assigned to a particular job to replace an employee of the opposite sex, comparison of the newly assigned employee's wage rate with that of the replaced former employee is required, whether or not the job is performed concurrently by employees of both sexes.

(2) A prohibited sex-based wage differential occurs if all employees of one (1) sex are removed from a particular job by transfer or discharge so as to retain employees of only one (1) sex in a job previously performed interchangeably or concurrently by employees of both sexes.

(a) The employer's obligation to pay the higher rate for the job cannot be avoided or evaded by confining the job to members of the lower paid sex.

(b) Compliance with the law can be achieved only by increasing the wage rate to the higher rate paid for the job when performed by employees of the opposite sex.

Section 4. Inequalities in Pay. (1) Inequalities in pay between employees of the opposite sexes which may be a violation of KRS 337.423 include:

(a) Where an inequality, allegedly based on a difference in job content, is in fact one on which the employee occupying the job purportedly requiring the higher degree of skill, effort, or responsibility receives the lower wage rate;

(b) Where employees of only one (1) sex are concentrated in the lower grades of the wage scale, and there is no material relationship other than sex between the lower wage rates paid to the employees and the higher rates paid to employees of the opposite sex; or

(c) If in a particular establishment all persons of one (1) sex tend to be paid at the lowest rate of the range and employees of the opposite sex hired to perform the same work tend to be paid at the highest rate of the range, and no specific factor or factors other than sex are associated with the difference in pay.

(2) Differentials in entrance rates shall not constitute a violation of KRS 337.423 if the factors taken into consideration in determining which rate is to be paid each employee are applied equally to men and women.

Section 5. Equality and Inequality of Pay in Particular Situations. (1) Overtime work. Overtime premiums are a part of wages for purposes of KRS 337.423.

(a) It is not a prohibited wage rate differential where:

1. Male and female employees perform comparable work during regular hours but employees of one (1) sex only continue working overtime into another work period and work performed during this later period is compensated at a higher rate where such is required by law or is the customary practice of the employer; or

2. Male and female employees are performing equal work in an establishment during regular hours but only some of these employees continue working into an overtime period, and payment of a higher wage rate is paid for the overtime, so long as employees, whether male or female, are paid for the actual overtime hours worked.

(b) A prohibited wage rate differential occurs where men and women receive the same straight-time rates for work subject to the equal pay standards, but employees of one (1) sex receive an overtime premium rate of twice the straight-time rate while employees of the opposite sex receive only one and one-half (1 1/2) times the straight-time rate for overtime.

(2) Special assignments. If an employee is required to perform an additional task outside regular working hours, it shall not justify payment of a higher wage rate to that employee for all hours worked. Employees who are assigned a different and unrelated task to be performed outside the regular workday may be paid at a different rate of pay for the time spent in performing such additional duty provided the rate is commensurate with the task performed.

(3) Vacation or holiday pay. Vacation or holiday pay is deemed to be remuneration for employment included in wages within the meaning of the law. A wage rate differential occurs when:

(a) Employees of one sex receive vacation pay for a greater number of hours than employees of the opposite sex;

(b) The work is subject to KRS 337.423; and

(c) There is no specified exception to the wage rate differential pursuant to KRS 337.423(1).

(4) Contributions to employee benefit plans.

(a) If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by KRS 337.423 will result from such payments, even though the benefits which accrue to the employees in question are greater for one (1) sex than for the other.

(b) The fact that an employer making unequal contributions for employees of opposite sexes in this situation will not be considered a wage rate differential prohibited by KRS 337.423, if the resulting benefits are equal for the employees.

(5) Commissions. The establishment of different rates of commission for different types of merchandise is not a violation of the equal pay provisions where the factor of sex provides no part of the basis for the differential.

(6) Head of household. Head of household status bears no relationship to the requirements of the job to an employee's performance on the job. If a differential in pay exists because an employee of one (1) sex is head of a household and the other employee of the opposite sex is not, the differential is based on the factor of sex.

Section 6. The Equal Pay for Equal Work Standard; Generally. (1) In accordance with KRS 337.423, an employer is prohibited from paying employees of one (1) sex wages at rates lower than employees of the opposite sex for comparable work on jobs with comparable skills, efforts, and responsibilities required for performance. Application of the equal pay standard is not dependent on job classifications or titles but rather on actual job requirements and performance.

(2) In accordance with KRS 337.423, jobs with comparable requirements shall be compared in applying the equal pay for equal work standard.

(a) Jobs that require comparable skill, effort, and responsibility in their performance may not be identical in every respect. Jobs shall be scrutinized as a whole and over a full work cycle.

(b) Inconsequential differences in job content shall not be a valid excuse for payment of a lower wage to an employee of one (1) sex than to an employee of the opposite sex if the two (2) employees are performing comparable work on essentially the same jobs in the same establishment.

(c) In determining whether job differences are so substantial as to make jobs unequal, whether and to what extent significance has been given to such differences in setting the wage levels for the jobs shall be considered.

(d) In determining whether differences in job content are substantial in order to establish whether or not employees are performing comparable work, the amounts of time which employees spend in the performance of different duties shall not be the sole criteria.

(3) In order for the equal pay standard to apply, an analysis of the following shall be conducted:

(a) Comparable skill in performance.

1. Skill includes factors such as experience, training, education, and ability. It shall be measured in terms of the performance requirements of the job.

2. If employees are required to have the same skill in order to perform either of two (2) jobs, the jobs require comparable skill, even though the employee in one (1) of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job. Possession of a skill not needed to meet requirements of the job shall not be considered in making a determination regarding comparability of skill.

3. The efficiency of the employee's performance in the job shall not be considered in evaluating skill;

(b) Comparable effort in performance.

1. Effort requires measurement of the physical or mental exertion needed for the performance of a job.

2. Jobs may require comparable effort in their performance even though the effort may be exerted in different ways on the two (2) jobs. Differences only in the kind of effort required to be expended in such a situation shall not justify wage differentials.

3. The occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort

4. A wage rate differential based on differences in the degree or amount of effort required for performance of jobs shall be applied uniformly to men and women; and

(c) Comparable responsibility.

1. Responsibility is the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. Differences in the degree of responsibility required in the performance of otherwise comparable jobs cover a wide variety of situations.

2. If one (1) employee of a group performing jobs which are comparable in other respects is required from time to time to assume supervisory duties for reasons such as the absence of the regular supervisor, payment of a higher rate to the employee might be based on the additional responsibility required to perform the job.

Section 7. Exceptions to Equal Pay Standards. (1) KRS 337.423(1) provides two (2) exceptions to the standard requiring that employees doing comparable work be paid equal wages, regardless of sex:

(a) Differentials paid pursuant to an established seniority system; or

(b) Differentials paid pursuant to established merit increase system.

(2) If an employer relies on the excepting language to exempt a differential in pay from the operation of the equal pay provisions, the employer shall be able to demonstrate that wage rate differential is based on a factor other than sex where it appears that the payments are for jobs requiring comparable skill, effort and responsibility.

(3) A showing that a wage differential is based on a factor other than sex, so as to be exempt from the KRS 337.423, may be incomplete without a showing that there is a reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex. To illustrate, if male employees who work forty (40) hours each week and female employees who work thirty-five (35) hours each week are performing comparable work on jobs, the performance of which requires comparable skill, effort and responsibility and they are paid weekly salaries for this work, a differential in the amounts could be justified as based on a difference in hours of work. However, if the difference in salaries paid is too great to be accounted for by the difference in hours of work, then it shall be necessary to show some other factor other than sex as the basis for the unexplained portion of the wage differential.

(4) Application of exceptions illustrated.

(a) When applied without distinction to employees of both sexes, shift differentials, incentive payments, production bonuses, performance and longevity raises and the like will not result in equal pay violations.

(b) "Red circle" rates. The term "red circle" rates describes certain unusual, higher than normal wage rates which are maintained for various reasons.

1. The use of a "red circle" rate may arise in a situation where an employer wishes to transfer a long-service employee, who can no longer perform their regular job because of ill health, to different work which is now being performed by employees of the opposite sex. Under the "red circle" principle the employer may continue to pay the employee his or her present salary, which is greater than that paid to the employees of the opposite sex, for the work both will be doing. Maintaining an employee's established wage rate despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex.

2. Where wage rate differentials have been or are being paid on the basis of sex to employees performing comparable work, rates of the higher paid employees shall not be "red circled" in order to comply with the statute.

(c) Temporary reassignments.

1. An employer may require an employee, for a short period, to perform the work of a job classification other than the employee's regular classification. If the employee's rate for the regular job is higher than the rate usually paid for the work to which the employee is temporarily reassigned, the employer may continue to pay the employee the higher rate, under the "red circle" principle.

2. An employee may be required, during the period of temporary reassignment, to perform work for which employees of the opposite sex are paid a higher wage rate than that paid for the duties of the employee's regular job classification. The employer may continue to pay the reassigned employee at the lower rate, if the rate is not based on quality or quantity of production, and if the reassignment is in fact a temporary one.

3. If a piece rate is paid to employees of the opposite sex who perform the work to which the employer in question is reassigned, failure to pay that employee the same piece rate paid to the other employees would discriminate on the basis of sex.

4. Failure to pay the higher rate to the reassigned employee after it becomes known that the reassignment will not be of a temporary nature is an indication that sex rather than the temporary nature of the assignment is the real basis for the wage differential. Failure to pay the higher rate for a period longer than one (1) month will raise questions as to whether the reassignment was in fact intended to be a temporary one.

(d) Training programs. Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. The employee in training status may be performing comparable work with nontrainees of the opposite sex whose wage rates may be unequal to those of the trainee. Provided the rate paid to the employee in training status is paid, regardless of sex, under the training program, the differential can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result.

(e) Temporary and part-time employees.

1. The payment of different wage rates to permanent employees than to temporary employees such as may be hired during the holiday season would not be a violation of the equal pay provisions even though comparable work is performed by both groups of workers.

2. The payment of a different wage to employees who work only a few hours a day than to employees of the opposite sex who work a full day will not necessarily involve noncompliance with the equal pay provisions, even though both groups of workers are performing comparable work in the same establishment.

KIMBERLEE C. PERRY, Commissioner

JAMIE LINK, Secretary

APPROVED BY AGENCY: January 3, 2022

FILED WITH LRC: January 10, 2022

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on March 28, 2022 at 1:00pm (ET). This hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph 8(b) (R.S. 2020) and the continuing state of emergency due to the novel coronavirus pandemic. Public access to the meeting will be available at <https://us06web.zoom.us/j/88108844438>, or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 786462. Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior

to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through March 31, 2022. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Duane Hammons, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 564-1507, fax (502) 564-5484, email Kenneth.hammons@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Duane Hammons

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation provides official interpretations of the Department of Workplace Standards for the meaning and application of the equal pay provisions in KRS 337.420 to 337.433. This regulation replaces 803 KAR 1:025.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to clarify the Department's interpretation of the meaning and application of equal pay provisions in KRS 337.420 to 337.433 to ensure employers are compliant with statutes.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 337.425 authorizes the commissioner to promulgate administrative regulations to carry out the purpose of KRS 337.420 to 337.433.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides guidance on how the department interprets the meaning and application of equal pay provisions set forth in KRS 337.420 to 337.433 which helps ensure compliance with statutes.

(2) If this is an amendment to an existing regulation, provide a brief summary of:

(a) How this amendment will change this existing administrative regulation:

(b) The necessity of the amendment to this administrative regulation:

(c) How the amendment conforms to the content of the authorizing statutes:

(d) How the amendment will assist in the effective administration of the statutes:

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects all subject employers who employ employees in the Commonwealth subject to KRS Chapter 337, as well as their employees.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional compliance duties are required as this administrative regulation is replacing 803 KAR 1:025.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost associated with this administrative regulation as it is replacing 803 KAR 1:025.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection and guidance of the equal pay provisions so employers can ensure compliance with applicable statutes.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:025.

(b) On a continuing basis: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:025.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: This administrative regulation is not anticipated to generate any increase in fees or funding as it is replacing 803 KAR 1:025.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: There are no fees associated with this administrative regulation.

(9) TIERING: Is tiering applied? Tiering is not applied. All subject employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Most state and local governmental entities are subject to KRS Chapter 337.

(2) Identify each state or federal statute or regulation that requires or authorizes the action taken by the administrative regulation. KRS 337.425.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate revenue.

(b) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate revenue.

(c) How much will it cost to administer this program for the first year? There is no cost to this administrative regulation as it is replacing 803 KAR 1:025.

(d) How much will it cost to administer this program for subsequent years? There is no cost to this administrative regulation as it is replacing 803 KAR 1:025.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown

Expenditures (+/-): Unknown

Other Explanation: This administrative regulation does not impose any additional requirements or expenditures as it is replacing 803 KAR 1:025.